No. 53

In the Supreme Court of the United States

October Term, 1954

United States of America, appellant

v.

International Boxing Club of New York, Inc., et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
STANLEY N. BARNES,
Assistant Attorney General,
PHILIP ELMAN,
DANIEL M. FRIEDMAN,
Special Assistants to the Attorney General,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

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OPINION BELOW

The district court did not render a written opinion. At the conclusion of argument on appellees' motion to dismiss the complaint, the court ruled that it would grant the motion, but the reasons which it gave for this ruling were not transcribed.

JURISDICTION

The judgment of the district court was entered on February 8, 1954 (R. 13-14). The petition for appeal was presented and allowed on March 12,

1954 (R. 15-16), and probable jurisdiction was noted on May 24, 1954 (R. 25). The jurisdiction of this Court is conferred by section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTIONS PRESENTED

1. Whether, as a result of this Court's decisions in the baseball cases (*Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200, and *Toolson* v. *New York Yankees,* 346 U. S. 356), the doctrine of *stare decisis* requires a holding that the business of promoting and exhibiting professional championship boxing contests is excluded from the scope of the federal antitrust laws.

2. If not, whether the allegations of the complaint are sufficient to establish that appellees' business—*i. e.,* the promotion, exhibition, broadcasting, telecasting and filming of professional championship boxing contests, on a multi-state basis—is "trade or commerce among the several States" within the meaning of sections 1 and 2 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in

restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action brought by the United States in March, 1952, under section 4 of the Sherman Act. The complaint alleges (par. 17, R. 5) that, since January, 1949, the appellees have been conspiring to restrain and to monopolize, and have monopolized, interstate and foreign trade and commerce in the promotion, exhibition, broadcast-

ing, telecasting, and motion-picture production and distribution of professional championship boxing contests, in violation of sections 1 and 2 of that Act.

Shortly after the decision in *Toolson* v. *New York Yankees*, 346 U. S. 356, appellees filed a motion to dismiss the complaint on the authority of that decision (R. 10-11; Appellees' Motion to Affirm, p. 3). Following the submission of briefs and oral argument, the district court granted the motion, and entered judgment of dismissal (R. 13-14).

The relevant facts stated in the amended complaint—admitted for the purposes of the motion to dismiss—are as follows:

The corporate appellees are International Boxing Club of New York, Inc. ("IBC(NY)"), International Boxing Club ("IBC"), and Madison Square Garden Corporation ("Garden") (pars. 3-5, R. 1-2). IBC(NY) and IBC are engaged in the promotion and exhibition of professional boxing contests, and Garden operates Madison Square Garden, the foremost sports arena in New York City (*ibid.*) There are two individual appellees, James D. Norris and Arthur M. Wirtz (pars. 6-7, R. 2), who, together with Garden, own eighty per cent of the stock of IBC(NY) and IBC (par. 8, R. 2).

A professional boxer greatly increases his earning power if he obtains recognition as "world champion" of the weight division in which he competes. He gains such title by defeating the existing cham-

pion or by eliminating all contenders, and remains champion until he is defeated by a contender, or resigns his title. Championship boxing contests are also the most remunerative for the promoter. Of the various world championships, the heavyweight division is the most lucrative (par. 11, R. 3-4).

Substantially all of the revenue which a promoter derives from championship contests comes from admission tickets and the sale of rights to televise, broadcast, and produce and distribute motion pictures of the fight.[1] Since 1949, sale of these rights has represented, on the average, more than twenty-five per cent of the receipts from championship fights. This proportion has been progressively increasing and, in some instances, receipts from sale of these rights has exceeded receipts (after Federal admission taxes) from tickets of admission (par. 16(a), R. 12).[2]

Appellees' conspiracy has consisted of a continuing agreement to exclude others from promoting championship boxing contests in the United States, and from selling television, radio, and motion-picture rights to such contests (par. 18, R. 5). In order to effectuate the conspiracy and the result-

[1] Radio and television broadcasts of such fights are transmitted "throughout" the United States, and motion pictures thereof are distributed to theatres "throughout" the country (par. 15, R. 5).

[2] In a heavyweight championship contest in May, 1953, receipts from the sale of these rights were approximately $300,000, as against approximately $250,000 from net gate receipts (par. 16(a), R. 12).

ing monopolization (par. 19, R. 5), appellees have done the following things:

(a) In January, 1949, the individual appellees and Garden agreed among themselves and with Joe Louis, then heavyweight champion of the world, that Louis would resign his title, that he would procure exclusive rights to the services of the four leading contenders for his title in a series of elimination contests which would result in recognition of a new heavyweight champion, and that he would assign these exclusive rights to appellees (par. 20, R. 6). Contracts reflecting the foregoing agreement were then entered into between a corporation in which Joe Louis owned the majority of the stock and the four leading contenders for the title, and these contracts, which also gave the corporation exclusive television, radio, and motion-picture rights to the contests (par. 21, R. 6), were assigned to IBC (par. 22, R. 6).

(b) Appellees have eliminated the "leading competing promoter" of championship matches (par. 23, R. 6).

(c) They have acquired the exclusive right to promote professional boxing contests in the "principal arenas" where championship contests can be successfully presented (pars. 24-25, R. 7).

(d) They have required each title contender to agree, as a condition of fighting for the championship, that, should he win, he would for a period of three (or sometimes five) years take part only in

title contests promoted by appellees (par. 26, R. 7-8).

(e) They have promoted, or participated in the promotion of, all but two of the twenty-one championship contests held in the United States since June 1949 (par. 27, R. 8).[3]

SUMMARY OF ARGUMENT

In our brief in *United States* v. *Shubert*, No. 36, this Term, we have set forth the reasons why we think that *Toolson* v. *New York Yankees*, 346 U.S. 356, reaffirmed *Federal Baseball Club* v. *National League*, 259 U.S. 200, only in so far as the latter held that baseball was not within the Sherman Act, and why we think it is not controlling on the applicability of the Act to any other business. In this brief, we shall merely summarize those arguments.

I

The factors which led this Court in *Toolson* to refuse to re-examine *Federal Baseball* are absent in the case of championship boxing. (1) *Federal Baseball* held only that baseball was not subject to the Sherman Act. This Court has never held that boxing is exempt from the Act. (2) Assuming *arguendo* that in 1922 the reasoning of *Federal Baseball* was also applicable to boxing, the latter business has not relied on that decision in the same sense that baseball has. After the *Federal Base-*

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[3] The total receipts from these contests have been approximately $1,500,000 (par. 16, R. 5).

ball case had, as a practical matter, insulated the "reserve clause" in players' contracts from attack under the Sherman Act, organized baseball developed an elaborate "farm system" of minor-league clubs, which is dependent upon the reserve clause. Championship boxing, on the other hand, has developed no comparable organization in the past thirty years in reliance on exemption from the Act. (3) In 1951, there was extensive Congressional consideration of whether baseball should be exempt from the antitrust laws, but no consideration of whether boxing should be exempted.

The economic characteristics of the two sports, and the practical consequences of holding them subject to the Sherman Act, are markedly different. Organized baseball is a tightly integrated organization of several hundred clubs which play a great many games each season. But, unlike most businesses, the competing teams in a league must co-operate to insure that no team becomes much superior to its competitors, otherwise public interest will wane. Championship boxing is conducted on a match-to-match basis, bouts are held relatively infrequently, the business has developed no comparable organization, and there is no need to maintain similar equality of competitors. In baseball, if the challenge to the reserve clause in the *Toolson* case had been sustained, far-reaching organizational changes would have been required. Granting the relief sought by the Government in the instant case, however, would not require substantial

changes in the basic structure of championship boxing. Accordingly, there are no reasons, either legal or practical, which would justify application of the rule of *stare decisis* to preclude the Court from deciding now whether the boxing business, as conducted by appellees in the manner described in the complaint, is subject to the Sherman Act.

II

Appellees concede that broadcasting, telecasting, and making and distributing motion pi tures are interstate commerce. Championship boxing today derives an average of twenty-five per cent—and in some fights a major portion—of its revenues from the sale of radio, television, and motion-picture rights. A business which derives so substantial a portion of its income from interstate operations is engaged in interstate commerce.

The *Federal Baseball* case (considered apart from *Toolson*) is not controlling on the question whether this business is interstate commerce. That case was decided at a time when there was no commercial broadcasting or telecasting or substantial motion-picture coverage of sporting events. Today, however, such coverage of professional boxing is an integral element of, and necessary to, the successful promotion of championship contests. Appellees' argument, that the proper comparison in determining whether *Federal Baseball* is controlling is between boxing today and baseball today, misconceives the basis of decision in *Toolson*. As shown in Point I, the *Toolson* case does not hold

that the present interstate aspects of baseball are insufficient to bring it within the Sherman Act, but only that, because of baseball's reliance on *Federal Baseball* and the history of Congressional consideration, the business of baseball, regardless of how it is conducted now or how it was conducted in 1922, is outside the Act until and unless Congress decides otherwise.

The fact that appellees do not themselves broadcast, telecast, or film the fights, but merely sell the rights to do so, does not change the interstate character of their business.

ARGUMENT

Appellees' motion to dismiss the complaint was made and granted upon the authority of *Toolson* v. *New York Yankees,* 346 U. S. 356 (Motion to Affirm, p. 3). Appellees contend (*id.,* pp. 3-4) that boxing is "similar, in all respects" to baseball, and is "indistinguishable from professional baseball, so far as the antitrust laws are concerned"; that the holding in *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200, namely, that "professional baseball was not within the scope of the Federal antitrust laws," which was followed in the *Toolson* case on the basis of *stare decisis,* is equally applicable to boxing; and that a contrary result "would require a magnification, amounting to distortion," of the "microscopic differences" between the two sports.

In our brief in *United States* v. *Shubert,* No. 36, this Term, we have set forth the reasons why we

think that the *Toolson* case reaffirmed the *Federal Baseball* case only in so far as the latter held that *baseball* was not within the Sherman Act, and why it is not controlling on the applicability of the Act to any other business. In this brief we shall merely summarize those arguments. The *Federal Baseball* case, standing alone, is not controlling on the applicability of the Act to the business of promoting professional championship boxing contests. And, unless the matter is foreclosed by the doctrine of *stare decisis,* we believe it clear that the latter business as conducted today is "trade or commerce among the several States" within the meaning of the Act.

I

This Court's Decisions in the Baseball Cases Do Not Require, Under the Doctrine of *Stare Decisis*, a Holding That the Business of Promoting Professional Championship Boxing Contests Is Excluded from the Scope of the Federal Antitrust Laws

In our brief in the *Shubert* case (No. 36, pp. 16-27), we have shown that this Court's refusal in *Toolson* to re-examine *Federal Baseball* represents solely an exceptional application of the doctrine of *stare decisis;* that this Court did not reaffirm any general "principle" laid down in *Federal Baseball,* but merely followed, "[w]ithout re-examination of the underlying issues," the narrow holding of the latter case that baseball is not subject to the antitrust laws; and that the *Toolson* case cannot be read as holding that other businesses or sports which may be comparable to baseball, in that they

involve personal performances or exhibitions for public entertainment, are also exempt from the Sherman Act. In short, in the *Toolson* case the Court did not pause to examine how the business of baseball is conducted now, or whether it differs materially from the business as it was conducted in 1922. The point of the *Toolson* case is that it decided nothing on the merits, and that—apart from its square holding that baseball is outside the antitrust laws unless and until Congress provides otherwise—no inferences can properly be drawn from it as to the Court's present views of the applicability of the Act to other businesses or sports. We also noted in the *Schubert* brief that the Court's refusal to re-examine its former decision was based on organized baseball's reliance upon the clear holding in *Federal Baseball* that it was not subject to the antitrust laws, and on the failure of Congress, which had the problem under consideration, to take action.

But these factors are not present in the case of professional championship boxing, and their absence dictates against invoking the doctrine of *stare decisis* to preclude consideration of whether, in the light of boxing's present substantial interstate aspects, that business is exempt from the Sherman Act.

In the first place, the *Federal Baseball* case held only that baseball was not subject to the Sherman Act. It did not hold, and this Court has never held, that boxing is similarly exempt.

But even assuming *arguendo* that in 1922 the rea-

soning of the *Federal Baseball* case was also applicable to professional boxing, there has been no showing that boxing did in fact rely on that decision in the same sense, or in any comparable degree, in which organized baseball did. The gravamen of the complaint in the *Federal Baseball* case was the alleged illegality of the so-called "reserve clause" in the players' contracts,[4] under which a player, once he signs his first contract with organized baseball, is precluded from ever playing for another club unless he is sold or released. H. Rep. No. 2002, 82d Cong., 2d Sess. (hereinafter cited as "Report"), p. 114. The holding in *Federal Baseball* that baseball was not interstate commerce had the practical effect of insulating the reserve clause from attack under the Sherman Act. Following that decision, organized baseball developed, at great expense, an extensive "farm system" of minor-league clubs owned or controlled by the major-league clubs (*id.*, pp. 62-74, 136, 177-189).[5] The farm system is "inextricably tied" to the reserve clause (*id.*, p. 185), and without that clause the farm system "could not exist" (*id.*, p. 183). It was this structure which organized baseball "develop[ed since

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[4] See *National League of Professional Baseball Clubs* v. *Federal Baseball Club of Baltimore*, 269 Fed. 681, 683 (C.A.D.C.).

[5] "At the time of the Federal League case the farm system, as we know it today, hardly existed, if at all." Report, p. 188. Today the major-league clubs own, or control by working agreements, 195 of the 364 minor-league clubs (*id.*, pp. 188-189). The "overriding purpose" of the farm system has been to supply the major-league clubs with new players (*id.*, p. 185); minor-league baseball has been relatively unprofitable (*id.*, pp. 96-97).

1922], on the understanding that it was not subject to existing antitrust legislation." *Toolson* case, p. 357.

Professional boxing, on the other hand, appears to have undergone little, if any, structural change since 1922, and it cannot point to any comparable organization which it has created in the past thirty years in reliance on exemption from the Sherman Act. Indeed, the restrictive practices upon which this suit is based were instituted only five and one-half years ago (pars. 17, 20-23, R. 5-7), and they involved only competitive practices, not the basic structure of the business. In short, there is no evidence that the boxing business—as distinguished from the particular restrictive activities of appellees—has ever "relied" upon any understanding, based on an authoritative decision of this Court, that it has been and would continue to be exempt from the antitrust laws.

The third factor upon which the Court relied in *Toolson* as a reason for not re-examining *Federal Baseball*—Congressional consideration—is also conspicuously absent in the case of boxing. In 1951, three identical bills were introduced in the House[6] for the purpose of protecting organized baseball from impending private litigation under the Sherman Act. (Report, p. 1.) Although these bills provided an exemption from the antitrust

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[6] H.R. 4229, 4230, 4231, 82d Cong., 2d Sess. A companion bill, S. 1526, was introduced in the Senate, but no hearings were held thereon.

laws for "organized professional sports enterprises or to acts in the conduct of such enterprises," the extensive hearings which a House subcommittee held on the bills related solely to "whether or not *organized baseball* should be exempted from the operation of the antitrust laws." (Hearings before the House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, Organized Baseball, 82d Cong., 1st Sess., p. 1 (emphasis added). Similarly, the subcommittee's lengthy report, which recommended that no legislation be enacted, dealt solely with organized baseball. (Report, *passim.*) This, presumably, was the consideration by Congress which the Court had in mind in *Toolson,* and since such consideration did not cover boxing it affords no basis for exempting the latter from the Sherman Act.

In determining whether there are practical reasons for applying the doctrine of *stare decisis* here, so that the exemption from the antitrust laws which baseball now has (as a result of the reaffirmance of *Federal Baseball* in *Toolson*) should be extended to boxing, the inherently different economic characteristics of the two sports should also be borne in mind. Organized baseball is a tightly integrated organization of 382 clubs (grouped into two major and forty-nine minor leagues) (Report, pp. 12-15, 229), which play many games each season (*id.*, p. 98). But, unlike most businesses, successful baseball operation requires that the competing teams cooperate with each other to insure that no one team attains too great superiority over its com-

petitors (*id.*, p. 212, 229).[7] For, unless all teams in the league are of relatively equal playing ability, public interest soon wanes (*ibid.*). "* * * [S]ingle exhibitions, however closely contested, do not maintain public interest unless they are a part of a larger drama—the quest for a championship." (Note, 62 Yale L. J. 576, 628.) The reserve clause, which has been described as the "keystone of the entire structure of professional baseball" (Report, p. 228), is designed to achieve this equality among clubs, for by tying players to particular teams it prevents the wealthier clubs from buying up all the leading players (*id.*, pp. 105, 208).

Championship boxing, on the other hand, is conducted on a match-to-match basis. It requires "no team organization, continuous employment, or cooperation among employers. The promoter can produce the entire exhibition by himself, hiring both or all of the skilled performers necessary for the match." (Note, 62 Yale L.J. 576, n. 268, p. 630.) Boxing has developed no organization comparable to that in baseball. Championship bouts are held relatively infrequently,[8] and a particular fighter's

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[7] In the early days of organized baseball, the inequality between the teams often was striking. In 1875, for example, the winning team, which had a "corner on the playing talent," won seventy-one games and lost eight, the runner-up team had a record of 53-20, and the last-place team won only two out of forty-four games (Report, p. 19).

[8] During the 33-month period June, 1949, to March, 1952, there were only twenty-one professional championship boxing contests in the United States (par. 16, R. 5).

protracted pre-eminence over all contenders apparently does not destroy public interest."

Thus, unlike the reserve clause in baseball, there is no basis for assuming that the restraints which appellees have imposed on championship boxing can trace their genesis and growth to any decision of this Court. Furthermore, in the *Toolson* case the complaint challenged the reserve clause, and if the challenge had been sustained, far-reaching changes in baseball's organization would have been required,[10] and substantial investments in the farm system might have been jeopardized. The instant case, on the other hand, merely seeks to restore the competitive situation as it existed prior to 1949, and granting of the relief which the Government asks would not substantially change the basic structure of the business, whatever effects it may have on the appellees' particular restrictive practices.

To summarize:—*Toolson* reaffirmed *Federal Baseball* only in so far as the latter held that *baseball* was not subject to the antitrust laws; the reasons which led this Court to refuse to re-examine

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[9] Joe Louis held the world's heavyweight championship for more than eleven years, during which period he successfully defended his title twenty-five times. World Almanac, 1954, p. 846.

[10] Respondents in the *Toolson* case argued that if the *Federal Baseball* case were overruled, "the present organization which has brought the sport to its present great popularity could not continue," and the resulting uncertainty "would undoubtedly result in the wrecking of the present organization of the game." Brief for respondents, No. 18, 1953 Term, pp. 66-67. See also brief for respondents in the companion case, No. 23, 1953 Term, p. 69.

Federal Baseball in the case of baseball are not present in boxing; the economic characteristics of the two sports, and the practical consequences of holding them subject to the Sherman Act, are markedly different. Accordingly, the Court should not consider itself precluded by any prior decision from examining on its merits the question of statutory construction here presented for the first time, namely, whether the business of promoting professional championship boxing, as it is conducted today, is interstate commerce within the Sherman Act. In Point II, *infra,* we shall show that it clearly is.

II

The Business of Promoting Professional Championship Boxing Contests Is "Trade or Commerce Among the Several States" Within the Sherman Act

Appellees concede (Motion to Affirm, p. 9), as indeed they must, that broadcasting, telecasting, and making and distributing motion pictures are interstate commerce. *Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266, 279 (radio); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 223 (radio); *Lorain Journal Co.* v. *United States,* 342 U. S. 143 (radio); *Dumont Laboratories* v. *Carroll,* 184 F. 2d 153, 154 (C. A. 3), certiorari denied, 340 U. S. 929 (television); *United States* v. *Paramount Pictures,* 334 U. S. 131 (motion pictures). Championship boxing today derives an average of twenty-five per cent—and in some fights a major portion—of its revenues from the sale of

radio, television, and motion-picture rights (see *supra*, p. 5). A business which derives so substantial a percentage of its income from interstate operations is, beyond question, itself engaging in interstate commerce. Cf. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225-226; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 602, n. 11, 610.[11]

The *Federal Baseball* case (considered apart from *Toolson*) is not controlling on the question of whether this business is interstate commerce within the Sherman Act. The rationale of that decision was that baseball games were purely local affairs, and that the interstate transportation of the players and equipment was "a mere incident, not the essential thing" (259 U. S. at 209). At that time, however, there was no commercial broadcasting or telecasting of sporting events, or widespread distribution of motion pictures thereof.[12] Today, radio, television, and motion-picture coverage of professional boxing is an integral element of, and necessary to, the successful promotion of championship contests. If the allegations of the com-

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[11] Plainly, the promotion of championship boxing contests is "trade or commerce" within the Sherman Act. See *Shubert* brief, pp. 28-31.

[12] Although the record in the *Federal Baseball* case does show that the major leagues sold the rights to transmit telegraphic play-by-play descriptions of the games, it does not appear that this was a significant or material element of the baseball business as then conducted. Indeed, the telegraphic reports are not even mentioned in the opinion of this Court or of the court of appeals (269 Fed. 681).

plaint are established by the evidence—and the Government, it is submitted, should not be denied the opportunity to present its proof of these allegations—these interstate aspects of the business no longer are "a mere incident" of the local contest, but must be deemed to have "rise[n] to a magnitude that requires it [them] to be considered independently," *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, 274, in determining the applicability of the Sherman Act. Accordingly, as in *Hart*, this case should be permitted to go to trial on these issues. The district court erred in ruling, as a matter of law, that the complaint failed to state violations of the Act. Cf. *United States* v. *Employing Plasterers Association*, 347 U. S. 186.

Appellees argue (Motion to Affirm, pp. 6-7), however, that the proper comparison for determining whether *Federal Baseball* is controlling is not between baseball as it was conducted in 1922 and boxing as now conducted, but between baseball today, "as it was presented to this Court in the *Toolson* case," and boxing today, "as presented in the complaint"; and that such comparison shows that professional boxing today has "considerably fewer" interstate aspects than baseball. This argument, as has been shown (*supra*, pp. 11-18), misconceives the basis of decision in *Toolson*. The *Toolson* case does not hold, as appellees would read it, that the present interstate aspects of baseball are insufficient to bring it within the scope of the Sherman Act. Indeed, that was the precise issue which this

Court refused to re-examine in *Toolson* because of its application of the doctrine of *stare decisis*, and that was the issue which the dissenting Justices in *Toolson* would have reached and would have decided in favor of Sherman Act applicability. See 346 U. S. at pp. 357-365. *Toolson* holds only that, because of organized baseball's development in reliance on the *Federal Baseball* case and the history of Congressional study, the Court would not re-examine the issue whether, in the light of baseball's present interstate operations, that business now is interstate commerce. It cannot be read as holding that, if the matter were re-examined, baseball would be held free of the Sherman Act, or that other sports which may be comparable to baseball are also exempt from the Act.[13] If additional exemptions from the Act are to be given, "they must come from the Congress, not this Court." *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 561.

Appellees further argue (Motion to Affirm, p. 9) that, although broadcasting, telecasting, and making and distributing motion-picture films may be interstate commerce, they are not engaged in such activities, since they merely sell the rights to do so. But the sale of these rights is the first step in, and

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[13] The recent case of *Shall* v. *Henry*, 211 F.2d 226 (C.A. 7), upon which appellees rely (Motion to Affirm, p. 4), similarly misinterprets the *Toolson* case. The *Shall* case held that a complaint charging a conspiracy in restraint of professional boxing did not state a cause of action, since "a professional boxing contest is not to be distinguished legally from that of a professional baseball game" (p. 229).

an integral part of, the subsequent transmission of visual and aural images of boxing contests across state lines. The sale of goods in one state for transportation to another state is just as much interstate commerce as the subsequent interstate transportation, *Currin* v. *Wallace*, 306 U. S. 1, 10, and cases there cited, and the same principle should govern the sale of rights to interstate transmission. Cf. *Gardella* v. *Chandler*, 172 F. 2d 402, 407-408 (C.A. 2) (opinion of Judge Learned Hand).

Furthermore, the interstate transmission is an integral element of the contests themselves, cf. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, and in determining the interstate character of appellees' business it is immaterial whether appellees themselves broadcast and film the contests, or designate others to do so. "[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U. S. 375, 398.

Appellees also contend (Motion to Affirm, p. 10) that any monopoly which a promoter has of the radio, television, and film rights to a particular contest "is inherent in the unique character of the event," and does not result from excluding others from the field "since there are no others who can have rights in that contest." This argument confuses the monopoly which a promoter always has of the particular contest he is promoting—a monopoly not unlike that of the owner of the only motion-

picture theatre in a town, cf. *United States* v. *Griffith*, 334 U. S. 100, 106—with appellees' monopolization of the entire business of promoting championship contests. It is by virtue of this monopoly power over the whole industry that appellees are able to exclude others from the broadcasting and filming of the championship contests. And this interstate broadcasting and filming is, as we have noted, a vital and necessary part of the business as it is conducted today.

CONCLUSION

The judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

STANLEY N. BARNES,
Assistant Attorney General.

PHILIP ELMAN,
DANIEL M. FRIEDMAN,
Special Assistants to the Attorney General.

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